

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 19

FLUOR HANFORD, INC.

Employer

and

Case 19-RC-15019

INTERNATIONAL GUARDS UNION OF  
AMERICA

Petitioner

**REGIONAL DIRECTOR'S DECISION AND ORDER**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record<sup>1</sup> in this proceeding, the undersigned makes the following findings and conclusions.<sup>2</sup>

**I. SUMMARY**

The Employer is a State of Washington corporation contracting with the Department of Energy (DOE) to provide management and operating services, including security, for the DOE's Hanford nuclear facility.

On September 28, 2007, the Petitioner filed the instant petition seeking by way of a self-determination election to include in its existing 215-member guard unit all of the Employer's 67 exempt patrol personnel with the rank of Lieutenant and Captain employed at the Employer's Hanford facility.<sup>3</sup> The Employer contends first that the petitioned-for lieutenants and captains should be excluded from the existing bargaining unit because they are either supervisors as defined by the Act or managerial employees. In the alternative, the Employer contends that if I find these employees are not statutory supervisors or managerial employees, a self-determination election would nevertheless not be warranted in that the captains and lieutenants

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<sup>1</sup> The Employer and Petitioner filed timely briefs, which were duly considered.

<sup>2</sup> The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. The labor organization involved claims to represent certain employees of the Employer and a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

<sup>3</sup> The Employer's Hanford guards have been represented by the Hanford Guards Union (HGU), (affiliated with the International Guards Union of America), since 1951 and are presently a party to a collective-bargaining agreement with the Employer effective from October 29, 2005 through October 31, 2010.

lack a community of interest with the existing bargaining unit sufficient enough to warrant their inclusion.

Based on the record as a whole and the parties' respective briefs, I find the Employer has established that its lieutenants and captains are statutory supervisors and 4 of its captains are also managerial employees. Having found the lieutenants and captains to be statutory supervisors and/or managerial employees, I need not determine whether the captains and lieutenants lack a community of interest with the existing bargaining unit and I shall dismiss the petition.

Below, I have set forth a section dealing with the evidence, as revealed by the record in this matter, relating to: (1) the operations at the Employer's facilities; (2) the statutory supervisory status of lieutenants and captains; and (3) the managerial status of the lieutenants and captains. Following the Evidence section is a restatement of the parties' positions, my analysis of the applicable legal standards in this case, conclusion, and my Decision and Order.

## **II. EVIDENCE**

### **A. The Employer's Operations**

The Employer employs 3100 employees at the Hanford nuclear facility under contract with the Department of Energy (DOE) to perform various dismantling, monitoring and clean up operations, including security. The facility's security is handled by the Employer's "Hanford Patrol," which employs the 67 lieutenants and captains at issue here. The Hanford Patrol division operates 24 hours a day, seven days a week, protecting 11 tons of nuclear weapons grade plutonium. The facility is divided into concentric squares with the "target," i.e., plutonium, stored in the center square, or Zone 1, located on 15 square acres of Hanford's 200 West area. Surrounding Zone 1 are Zones 2 and 3 comprising 40-60 acres and 180-200 acres of 200 West area respectively. The outermost zone, Zone 4, is located on 200 East area and comprises the remaining 500 square acres of the Hanford site.

The Employer's security operation at Hanford is structured on a military model and headed by a Chief, Gregory Paul McDowell, and a Deputy Chief, Rudy Morris, both of whom testified for the Employer, as did its Operations Manager, Major Monty Giulio. Shift commanders, all Majors, are next in the line of command and are responsible for the daily operations of Hanford Patrol during the different shifts.<sup>4</sup> Under these individuals are the petitioned-for captains and lieutenants.

The Employer operates 6 shifts: shifts A-D, a training shift, and an HQ shift. Shifts A, B, C, and D are rotating 12-hour shifts (rotating every 10 weeks) beginning at 5:30 a.m. and 5:30 p.m. and include 3 teams per shift comprised of the represented unit of Security Police Officers (SPOs) I, II and III respectively. Each team consists of 7 to 15 represented guards and is headed by a Shift Lieutenant of the same SPO level as is his team, for a total of 12 shift lieutenants on the A-D shifts.<sup>5</sup>

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<sup>4</sup> The parties did not stipulate that these individuals are statutory supervisors or managerial employees. However, neither party contends that these individuals should be included in any self-determination election with the lieutenants and captains.

<sup>5</sup> Lieutenants start their shifts one hour earlier than do the other team members.

SPO-IIIs are the Employer's elite and highest trained guards and are referred to as the Employer's Special Response Team (SRT). They are not specifically assigned to patrol just one zone, but rove about the site when called upon to do so. SPO-IIs comprise the Employer's Tactical Response Team (TRT), also highly trained, but not to the level of its SPO-IIIs. A special training shift comprised of 15 bargaining unit guards also exists to relieve the TRT and SRT teams periodically so that these teams can attend DOE mandated training at the Employer's Patrol Training Academy (PTA). 18 of the petitioned-for captains at the Academy serve as trainers for the various SPO levels and occasionally fill in for an absent shift lieutenant. SPO-Is do not need the level of training of the other two teams and train by using overtime rather than by being relieved by a relief shift.

To round out the shift structure, an HQ shift, headed by Major Guilio, operates on a Monday through Friday day schedule and includes the captains responsible for the different zones along with captains, other than those at the Academy, responsible for training, although this training was not described in any detail.<sup>6</sup> About 50 percent of HQ captains' work-time is devoted to substituting for shift lieutenants who are out sick or on vacation.

Besides the shift structures, the Employer also divides its operations into different functions. For example, as already mentioned, the Employer's operations support a Patrol Training Academy, a Special Response Team and a Tactical Response Team. Included with these groups are the divisions of Operations Support Staff, a K-9 unit and two communications divisions—a Central Alarm Station (CAS) located in Zone 1, and a Patrol Operations Center (POC) located structurally with the K-9 unit.

The CAS is a communications complex primarily concerned with communicating with Hanford Patrol officers and field teams, and with the DOE regarding potential terrorist threats. CAS is under the direction of Captain D.E. Boschker, and on-site supervision is provided by CAS lieutenants, one for each of the A through D shifts.

The POC is also a communications center, but in contrast to CAS's terrorism emphasis, the POC's emphasis is more in line with communications surrounding environmental emergencies such as chemical spills and radiation leaks.<sup>7</sup> POC is under the direction of Major Lorin Cyr, who is also director of the K-9 unit. The POC is supervised by Captain T.P. Eberts and manned by 10 lieutenants. Although a represented unit radio operator is also stationed in the POC, it appears he is not part of that operation, although his duties are otherwise unclear. There are no other represented unit employees in POC. The lack of represented bargaining unit employees at the POC is due mostly to the DOE, which has expressed its desire that no union member be assigned to POC for "privacy" reasons.

Finally, the Operations Support Staff operates 6 support functions and is therefore conveniently subdivided into six subdivisions: Safety, Logistics, Staff Services (serving a personnel function for Hanford Patrol), Security Incident Response Plan/Vulnerability Assessment (SIRP/VA), Site Support/EP, and Self Assessments. Except for Safety, which has

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<sup>6</sup> Although the Chief mentioned Zone 4, located at 200 East area, it appears most of the operations structure concerns Zones 1, 2, and 3, in 200 West area of the Hanford facility. There is a Captain responsible for each zone and a Major, or Shift Commander, for each of the A-D shifts. Only 2 of the already represented unit members are on the HQ shift.

<sup>7</sup> POC serves as a backup for CAS if something happens to CAS's ability to communicate with the various teams in the field.

2 represented unit members, no other subdivision of the Operations Support Staff has represented employees as part of its structure.

**B. Supervisory Authority**

**1. Assignment and Responsible Direction**

The 12 shift lieutenants start their shifts an hour before their SPO teams report so that the lieutenants can set up to disarm teams ending their shift and issue arms to teams starting their shift (some of the arms issued to patrolmen are classified and thus not revealed in the record). Shift lieutenants also hold what is called a "line-up" at the beginning of a shift where lieutenants take attendance, disseminate pertinent information to their teams and offer available overtime. Shift lieutenants also assign each member of their respective teams to a specific post within their assigned area, and assign training. Arturo Cantu<sup>8</sup> testified for the Petitioner that as a shift lieutenant, when it came to assigning patrolmen to individual posts, he rotated his post assignments because all his men are required to be familiar with the terrain and instructions for each post.

As for training, Cantu testified that because of the PTA training schedules, he is provided with only two days in which to schedule his team's training. Besides PTA training, shift lieutenants have authority to direct and carry out corrective training themselves. This occurs when they spot-check patrolmen during post checks. When checking a post, a shift lieutenant may quiz the patrolman on his knowledge of, for example, the procedures to properly don and remove gas masks, or the password, etc. The shift lieutenant has the authority to correct the patrolman if the patrolman is too slow or fails to properly don or remove a mask, or remind him of the password. A shift lieutenant can also direct an employee off the base if he feels the employee is a safety hazard to himself or others. However, this authority appears limited to emergency or highly unsafe activity on the part of the patrolman, which includes sleeping on the job. Shift lieutenants can be and have been disciplined for their failure to correct patrolmen's unacceptable behavior which they have observed.

Shift lieutenants are also responsible for directing their teams during emergency situations. Cantu testified that in an emergency situation he encountered--a vehicle accident--he directed members of his team to block off the road leading to the accident site and directed other members of his team to set up roadblocks and direct traffic away from the accident scene. When asked how he decided on the individuals to assign the different tasks in response to the emergency, he said that his team is highly trained and the men know their jobs. Accordingly, he testified that he assigned the tasks to "whoever could get there the quickest." As for how he determined what tasks he assigns during emergencies, he testified that although the Employer has some emergency guidelines he can refer to, he had no checklist for responding to emergency situations and relied on his experience and training to redirect his team to respond to the accident.

Shift lieutenants do not have the authority to reassign members of their team to other teams, or reassign them to other shifts or to areas outside what the team is assigned to cover. Shift lieutenants, however, do have authority to grant or deny requests for transfers to other teams or shifts.

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<sup>8</sup> As of the hearing, Cantu had recently been promoted from shift lieutenant to captain to serve in a newly created position that had not previously existed. At the time of the hearing, he had not yet started in his new position.

The Employer also contends that CAS and POC lieutenants possess and have exercised their authority to direct patrols in the field where a response to an alarm is indicated. The record reveals that CAS and POC operators are trained on how to respond to the specific alarms and to particular circumstances. Major Guilio testified about the existence of written guidelines on how the Employer expects the CAS or POC to respond, given certain alarms. However, he also testified that the actions that a CAS or POC lieutenant takes in accordance with the expected response is at their discretion. In that regard, Major Guilio testified that in response to an alarm, CAS and POC lieutenants have, for example, either called the lieutenant on duty about the alarm for the lieutenant to handle the situation, or directly dispatched particular employees to answer the alarm. An alarm could be as serious as a breach of the Hanford facility perimeter or as simple as someone forgetting to close a bathroom door.

## **2. Authority to Grant Time-Off**

Shift lieutenants award vacation by seniority as provided for in the collective-bargaining agreement between the Union and Hanford Patrol. When special circumstances arise such as family emergencies or illnesses, shift lieutenants can grant time off as a "split vacation." Cantu testified that the Chief had instructed shift lieutenants to give the time off "if at all possible" as long as the individual was not in what was referred to as "category 2 or 3" absences. The Employer charts employee absences and those employees that fall within category 2 have used a number of absences already and, in this situation, the shift lieutenants are to look to the reasons for any further request submitted by an employee charted as a category 2. A request of an employee in category 2 may be declined, especially if the employee's work is not up to par. It may also mean that an employee in category 2 would not be granted paid leave if he did not produce a doctor's note after taking sick leave, but unpaid leave is warranted only if the employee was at fault; otherwise, shift lieutenants are advised by the Chief to pay the employee. Although not as descriptive in the record as category 2, employees reaching category 3 face even stricter limitations on leave.

## **3. Overtime Assignment Authority**

Shift lieutenants have no authority to determine the number of patrolmen on a team. So, for example, if a patrolman is out sick, the shift lieutenant must find a replacement, which means, basically, offering overtime to an off duty patrolman. For special circumstances, such as when an alarm goes out on part of the perimeter fence, shift lieutenants can offer overtime to patrolmen to patrol the area covered by the faulty alarm. Shift lieutenants, however, do not have the authority to require an employee to come in. Moreover, shift lieutenants have no discretion as to whom to call to offer overtime as the collective-bargaining agreement requires that overtime be offered according to seniority.

## **4. Authority in Adjusting Grievances**

The collective-bargaining agreement provides for a grievance procedure; the first formal step of which directs a grievant to his "immediate supervisor." Shift lieutenants, for example, are immediate supervisors with authority to resolve the grievances at this step so long as the resolution is still within policies and procedures set by the Employer and in conformance with the collective-bargaining agreement. Grievances have been submitted to the shift lieutenants, particularly in response to overtime assignment disputes, of which there appear to be many.

If a grievance cannot be resolved with the shift lieutenant at step 1, the grievance moves to step 2, where Captain Parrish reviews all grievances not resolved at step 1 and attempts, sometimes with the Chief or Deputy Chief, to resolve the issue at step 2 before it goes to the final step for resolution. At step 3, the issue is reviewed by Fluor Hanford's Industrial Relations department, which has at least this human resource responsibility over Hanford Patrol conferred on it by the collective-bargaining agreement.

## **5. Authority to Promote**

The Employer uses a "promotion Board" in its selections for promotion. Major Guilio testified "There's not a formal process [for promotions]. It really depends on where the Shift Lieutenant's position is. If I know that the Shift Lieutenant's position is going to be, say, for the SRT program, then I want at least one of their peer group, their possible peer group to be sitting on the board with me. [This is b]ecause they're the ones who are going to have to work with this guy." The Board consists usually of five people and in the case of a promotion to the position of shift lieutenant, the Board panel will consist of at least one of the shift lieutenants. The other panel members consist of other officers, such as captains, majors or even the Chief, and others from the support staff. Questions for the candidate are either already written out and supplied to the panel members, who then score an applicant's responses to the questions; or, the panel members submit their questions to the chair of the board who decides which questions shall be asked and composes the list of those questions submitted to the panel members. The scores of each of the panel members are then added up and the applicant with the highest total score is promoted.

## **6. Authority to Discipline**

The Employer posted its "Standards of Conduct" that establish the rules of conduct for Hanford Patrol. In enforcing its Standards of Conduct, the Employer has employed both formal and informal discipline. Shift lieutenants, for example, have issued informal verbal counseling which may be written down and placed in a patrolman's personnel file. However, the Employer does not consider verbal counseling to be disciplinary and no specific evidence was offered to the contrary.

The Employer employs a progressive disciplinary procedure where discipline begins with a verbal reprimand, progressing to a written reprimand, moving to suspension without pay, and ultimately resulting in termination--although certain serious misconduct warrants immediate termination such as deliberate disregard for safety rules and procedures, insubordination, falsification of records, etc.

In order for formal discipline to be issued, an investigation must first be performed by a supervisor, "who is not involved as a witness or participant to the incident being investigated." In the case of patrolmen misconduct, this investigation is usually performed by a shift lieutenant who then writes up his report and attaches a proposed disciplinary letter containing his recommended discipline to be issued. The shift lieutenant then takes his report and proposed disciplinary letter to the shift commander, and together, in consultation with each other, they agree on a recommendation for discipline and forward the report and recommendation to a Workforce Services Rep from staff support.

Although the Petitioner argues in its brief that the shift commander may or may not discuss the matter with the lieutenant and may or may not concur in the discipline before he sends up both his and the lieutenant's recommendations, the record shows otherwise. For

example, Petitioner cites Major Giulio's testimony for its contention. However, Major Giulio, in discussing discipline for a patrolman involved in a vehicle accident, testified that in such situations, he and the lieutenant "sit down, whenever it's a suspension, and we talk about how long it should be." And then "we agreed upon" a recommendation.

The Workforce Services Rep may, according to the written disciplinary procedure, also conduct an independent investigation to review the facts "in a particular case," but no instance of such an investigation taking place is disclosed in the record. The Petitioner asserts, again citing Major Giulio, that it is "HR who makes the final recommendation on what discipline should be imposed." However, Major Giulio testified that it is HR that "keeps us in line that our discipline is consistent across the board within our organization." Furthermore, HR "can't change our recommendation. [It] can recommend an alternate discipline ... [but] discipline is ultimately up to the department."

After a Workforce Services Rep reviews the discipline for consistency with similar discipline throughout the facility, the shift lieutenant issues his disciplinary letter to the patrolman. Besides shift lieutenants, other lieutenants, as well as captains, have used this disciplinary procedure to issue discipline. For example, a lieutenant issued a two-day suspension to a patrolman for inattentive driving, which resulted in an accident. A captain issued a written reprimand instead of a suspension to another patrolman involved in a vehicle accident. In the captain's case, he discovered mitigating circumstances that warranted a less severe discipline than that issued by the lieutenant investigating the accident caused by another patrolman.

The evidence shows that all lieutenants and captains, including CAS and POC lieutenants, possess the same authority to discipline as shift lieutenants and all lieutenants and captains are made aware of their authority to discipline employees, as it is described in their position descriptions and contained in their evaluations. Lieutenants and captains themselves could be, and have been, disciplined for not initiating discipline against a patrolman when the circumstances for such present themselves. In that regard, the record reveals a POC lieutenant was issued a verbal warning for failure to discipline the radio operator stationed at the POC who had used inappropriate language and raised his voice when addressing another patrolman over the phone.

## **7. Authority to Hire**

Applicants for positions with the Employer are initially reviewed by support staff to determine whether the applicants are minimally qualified. This review would include, not only whether the level of experience and training of the applicant conforms to that required for the position applied for, but also a candidate's satisfaction of the physical requirements for the job, and any background checks required by the Employer or the DOE. Those candidates who comply with these initial requirements are then interviewed by one of 5 interviewers: the Chief, Deputy Chief, Major Meyer, Captain DeGroof, or Captain Parrish. Each interviewer scores the candidates sent to them and their score for each candidate will determine whether that candidate is offered a position. The interviewers know the point system and what the cut off will be for those who are offered a position. Thus, they are aware when they assign a score to a candidate whether that candidate will be offered a position.

## **C. Managerial Authority**

The Employer also contends that many of its lieutenants and captains, including PTA instructors, POC and K9 administrators, the K9 trainer, and all the operation support staff positions, as well as the CAS administrator and lieutenants are managerial employees. The Employer contends and the record shows that PTA captains develop their own training programs and train employees to perform the functions required by the Employer. However, on the one hand, these teaching duties of the captains are not discretionary. The PTA captains possess little, if any, discretion in whether courses are or are not offered by the Employer, and little discretion as to the quality of any courses that they are to teach as these matters are requirements for the necessary certifications dictated by outside entities as well as the Chief.

On the other hand, the record shows that captains have discretion in matters outside of their teaching duties. Captain Gibbons, a PTA instructor, has purchasing authority of \$50,000 to buy supplies and equipment for the PTA. No approval is necessary for his purchases, although the Chief or Deputy Chief must sign that the purchases were legitimate.

The record also shows that Captain Steve Voigt, who operates the live firing ranges at the PTA, is responsible for maintaining the huge amount of ammunition needed by the Employer. He orders the majority of the ammunition used by the Employer; and, with the Employers' Armorers, works with manufacturers in designing firearms for use by the Employer. Although the Chief makes the ultimate decision on what to buy, he relies on the expertise of Captain Voigt in making that decision.

The Lead Logistics Officer, Captain Ray McElroy, also has purchasing authority wherein he possesses discretion. He effectively recommends purchases of materials and equipment for the Employer, communicates with vendors as the Employer's representative, issues bid specifications for the Employer, and inspects for quality any product that is delivered and has authority to return defective products. Although large purchases must be approved, he has authority to commit \$5,000 per month of the Employer's funds with little review.

Captain Wise, Patrol Operations Specialist, possesses authority to represent the Employer in negotiations with outside entities, such as the Pacific Northwest National Labs, to provide security services. Captain Wise also coordinates the Employer's activities at Hanford with the U.S. Navy, Solid Waste, Bechtel and the Federal Protection Service.

### **III. POSITIONS OF THE PARTIES**

The Petitioner has petitioned for an election of the Employer's lieutenants and captains as to whether they desire inclusion in the existing unit of security patrol officers located at the Employer's Hanford facilities. The Employer contends that its lieutenants and captains should be excluded from the existing unit because they are statutory supervisors and/or managerial employees. In the alternative, the Employer contends that its captains and lieutenants lack a sufficient community of interest with the existing unit members to warrant their inclusion.<sup>9</sup>

### **IV. ANALYSIS**

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<sup>9</sup> Although not specifically asserted by the Employer, the evidence shows that Captains Parrish and DeGroof exercise hiring authority in that their ratings of candidates referred to them for consideration determine whether the candidate will be offered a job with the Employer. These captains are fully aware of the cut off point in their ratings that determine who will be offered a position. Thus, I find that Captains Parrish and DeGroof exercise supervisory authority in hiring.



## **A. Supervisory Authority**

Section 2(3) of the Act excludes “any individual employed as a supervisor from the definition of ‘employee.’” Section 2(11) of the Act defines “supervisor” as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 2(11) is to be read in the disjunctive, and the “possession of any one of the authorities listed in [that section] places the employee invested with this authority in the supervisory class.” *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6<sup>th</sup> Cir. 1949), cert. denied 338 U.S. 899 (1949). The exercise of that authority, however, must involve the use of independent judgment. *NLRB v. Kentucky River Community Care Inc.*, 121 S.Ct. 1861 (2001). The legislative history of Sec. 2(11) indicates that Congress intended to distinguish between employees who may give minor orders and oversee the work of others, but who are not necessarily perceived as part of management, from those supervisors truly vested with genuine management prerogatives. *George C. Foss Co.*, 270 NLRB 232, 234 (1984). For this reason, the Board takes care not to construe supervisory status too broadly because the employee who is deemed a supervisor loses the protection of the Act. *St. Francis Medical Center-West*, 323 NLRB 1046 (1997). Thus, the burden of proving supervisory status is on the party (i.e., the Employer herein) alleging that such status exists. *Kentucky River*. That means that any lack of evidence in the record is construed against the party asserting supervisory status. *Freeman Decorating Co.*, 330 NLRB 1143 (2000). Moreover, whenever evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, the Board will find that supervisory status has not been established. *Phelps Medical Center*, 295 NLRB 486, 490-91 (1989). Additionally, mere opinions or conclusory statements do not demonstrate supervisory status. *Chevron U.S.A.*, 309 NLRB 59 (1991); *St. Alphonsus Hospital*, 261 NLRB 620 (1982), enf’d; 703 F.2d 577 (9<sup>th</sup> Cir. 1983).. Furthermore, proof of independent judgment in the assignment or direction of employees entails the submission of concrete evidence showing how such decisions are made. *Harborside Healthcare, Inc.*, 330 NLRB 1334, 1336 (2000); *Crittenton Hospital*, 328 NLRB 879 (1999); *Franklin Home Health Agency*, supra.

Here, the Employer contends that its lieutenants and captains are statutory supervisors in that they assign and responsibly direct employees, grant employees time off, authorize shift trades and overtime, adjust grievances, promote and discipline employees, and evaluate and assess performance and fitness for duty.

### **1. Authority to Assign and Responsibly Direct**

The Board uses the term “assign” to refer to the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime.), or giving significant overall duties, i.e., tasks, to an employee. The Board does not consider ad hoc instructions that the employee perform a discrete task as “assigning.” *Oakwood Healthcare, Inc.*, 348 NLRB No. 37, slip op. at 4 (September 29, 2006).

The authority to "responsibly direct" arises when a person on the shop floor has men under him or her and if that person decides what job shall be undertaken next or who shall do it, provided that the direction is both responsible and carried out with independent judgment. For direction to be responsible, the person performing the oversight must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed are not performed properly. *Id.* slip op. at 7. Thus, to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps. *Id.*

To exercise independent judgment an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or an evaluation by discerning and comparing data. *Id.* slip op. at 8. The judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement. On the other hand, the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices. *Id.*

Here, the Employer lists a litany of duties and authorities that it contends show its captains and lieutenants possess 2(11) supervisory authority. In that regard, the Employer first proffers that shift lieutenants assign patrolmen in their team to posts by rotation so that all of his team will know the terrain and the post orders specific to each post, as required by the Employer. However, the Board has found that merely rotating employees in order to have them conform to Employer requirements does not evidence the level of independent judgment necessary to find supervisory authority. See, e.g., *KGW-TV*, 329 NLRB 378, 382 (1999)(purported supervisor's assignments based on equalizing employees' workloads are routine and does not rise to the level of independent judgment).

The Employer also asserts that CAS and POC lieutenants exercise independent judgment in dispatching field teams in response to alarms; thus, they arguably demonstrate 2(11) supervisory authority. However, the Board has concluded that movement of employees to meet the employer's "production" needs does not exhibit the level of independent judgment necessary to find 2(11) supervisory authority. See, e.g., *Hexacomb Corp.*, 313 NLRB 983 (1994); *Hydro Conduit Corp.*, 254 NLRB 433, 438-39 (1981).<sup>10</sup>

The Employer's contention that shift lieutenants possess 2(11) supervisory authority to direct their teams during emergency situations, such as that encountered by lieutenant Cantu, is however supported by the record. In that regard, the emergency encountered by Cantu required him to evaluate the emergency by discerning and comparing the incident with an appropriate response. He had no checklist to consult and, instead, relied on his experience and training in devising a plan of action that he then used to direct his team during the emergency. I find the independent judgment required of shift lieutenants in directing their teams when faced with certain kinds of emergency situations sufficiently demonstrates 2(11) supervisory authority.

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<sup>10</sup> Although the Employer asserts that POC lieutenants are supervisors because the DOE explicitly expressed a desire that the POC not be staffed by union members, the DOE's expressed wishes are not an indicia of 2(11) supervisory authority. See, e.g., *Third Coast Emergency Physicians, P.A.*, 330 NLRB 756, n.1 & 759 (2000)("government requirement that mid-level practitioners be supervised by a supervising physician does not establish that the employer's emergency room physicians meet 2(11) supervisory requirements").

See, e.g., *Ingram Barge Co.*, 336 NLRB 1259 (2002) (towboat pilots found supervisors where non-routine factors and “dynamic activity” such as traffic conditions necessitate making decisions regarding operational changes that require directing deck crew work).

As for whether lieutenants’ and captains’ directions are “responsible” directions, the record contains instances where lieutenants have been disciplined for not enforcing the Employer’s rules. Furthermore, the record evidence demonstrates that all lieutenants and captains have been informed that they possess this authority and they are evaluated on whether they properly exercised this authority in enforcing the Employer’s rules, if the occasion arises. The fact that such an occasion may not or has not arisen for some lieutenants and captains, does not in itself signify these lieutenants and captains do not possess this authority. See *Metropolitan Transportation Services, Inc.*, 351 NLRB No. 43 slip op. at 5 (September 29, 2007); *Babcock & Wilcox*, 288 NLRB 620 (1988).

Accordingly, although the record does not support the Employer’s contention that the lieutenants and captains have the authority to “assign,” I find the Employer has established that its captains and lieutenants possess and in many cases exercised statutory authority to responsibly direct employees, and that they are held accountable for the actions of their subordinates.

## **2. Grant Time Off**

The Employer maintains its lieutenants and captains have supervisory authority to grant time off. I find the evidence does not support the Employer’s contention. Rather, the evidence shows that vacations are awarded on the basis of seniority, as controlled by the collective-bargaining agreement. Moreover, the Chief communicated to lieutenants and captains that sick leave, or “split-vacation” leave is to be awarded if at all possible, unless an employee’s times taken off place them in category 2 or 3 in a chart maintained for this purpose. Such specific requirements and limitations on lieutenants’ and captains’ authority to grant time off do not demonstrate the level of discretion necessary to find 2(11) supervisory authority.

## **3. Authority to Assign Overtime**

The Employer contends that the shift lieutenant’s authority that to grant overtime is also supervisory authority as defined by the Act. The evidence shows that the shift lieutenants’ authority in this matter is limited and shift lieutenants have little discretion in the matter. There are minimum requirements for how many employees are to man a team and any absences in his team require him to find replacements. Shift lieutenants also do not have the authority to require employees to come in. Furthermore, any decision on who to offer overtime to is limited to choosing by seniority, as provided for in the collective-bargaining agreement. The Board found such authority in these circumstances does not evidence 2(11) supervisory authority. See *Golden Crest Healthcare Center*, 348 NLRB No. 39, slip op. at 3 (September 29, 2006); *Harborside*, *supra*.

## **4. Authority to Adjust Grievances**

The Employer also contends lieutenants and captains demonstrate supervisory authority in adjusting grievances. I agree. The evidence shows that shift lieutenants are management’s representatives at the first formal stage of the contractual grievance procedure and that Captain Parrish processes stage 2 grievances. At each of these stages, these individuals have authority to resolve the grievance. Such authority has been found by the Board to exhibit 2(11)

supervisory authority to adjust grievances. See *Sheet Metal Workers International Association, Local Union 68*, 298 NLRB 1000 (1990). Accordingly, I find shift lieutenants and Captain Parrish possess this authority.<sup>11</sup>

I also find, however, that there is no evidence that those lieutenants, mostly POC lieutenants, and those captains without assigned subordinates under their direct supervision (with the exception of captain Parrish), possess authority to adjust grievances inasmuch as the contract specifies that the grievant must present his or her grievance to his or her “immediate supervisor.” There is no other evidence that lieutenants and captains without subordinates possess 2(11) authority to adjust grievances. See *Staco*, 244 NLRB 461, 461-62 (1979) (Board still required a showing of supervisory authority of an individual who allegedly stands in the same relation to employees as those found to be statutory supervisors).<sup>12</sup>

## **5. Authority to Promote**

The Employer contends that lieutenants and captains possess the authority to promote employees. The evidence shows that lieutenants and captains have served as members of a 5-person promotion board. However, their presence on the board, as testified to by Major Guilio, was to have at least one of the candidate’s possible peers on the board “[b]ecause they’re the ones who are going to have to work with this guy.” In such circumstances, the lieutenants’ and captains’ participation cannot be said to be anything more than determining whether an applicant would be compatible with the “team” and is not evidence of 2(11) supervisory authority. See *Tree-Free Fiber Co.*, 328 NLRB 389 (1999).

In any event, panel members scored each candidate from a list of questions supplied by the board chair. Neither the lieutenants nor the captains had input into the cut off mark for scoring candidates and a lieutenant’s or captain’s individual score would not in itself be determinative of a candidate’s promotion. Thus, I find the evidence fails to show lieutenants and captains possess 2(11) authority to promote employees. See *Capri Sun*, 330 NLRB 1124, 1131 (2000); cf. *Entergy Systems & Service, Inc.*, 328 NLRB 902 (1999) (supervisory authority found where no employee receives a promotion unless employees’ crew leader recommends promotion and all crew leaders concur with recommendation).

## **6. Authority to Discipline**

The Employer asserts that lieutenants and captains possess the authority to discipline employees. I find the evidence supports the Employer’s assertion. Lieutenants and captains

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<sup>11</sup> The Petitioner, in its brief, argues that lieutenants “are the fact finders” and “gather the evidence and forward that up the chain” citing Deputy Roberts and Cantu’s testimony. However, Roberts testified that Captain Parrish will review for consistency a lieutenant’s draft response to a step one grievance and sometimes assist in that he might tell a lieutenant, “hey, why don’t you just go fix it?” Moreover, Roberts testified that if attempts at adjusting grievances are unacceptable to the Union at Step 1, the supervisors sends the case to Step 2 and advise Parrish “that, hey, they didn’t accept the grievance answer.” As for Cantu’s testimony, he merely testified that “If I have no control over the problem that exists or that has occurred then it’s written on a form, grievance form. And then I would put my recommendations to the problem on there, also, and that would be the stage one, then it would go forward.”

<sup>12</sup> This also holds for Cantu’s new position. Especially so when the position did not exist prior to Cantu’s holding it. In such circumstances, the Board “determination as to the proper unit placement...must be based on what the individual filling [the position] actually do[es] now, as opposed to what [he or she] speculatively may be doing some time in the future.” *Southwestern Bell Telephone*, 222 NLRB 407 (1976).

are held accountable for enforcing the Employer's rules of conduct and they have been disciplined for failing to do so. This authority has been communicated to each lieutenant and captain by way of their position descriptions, which are supplied to them, and they are evaluated on such supervision over employees. During the formal disciplinary procedure, the supervisor assigned to investigate an allegation of an employee's breach of the rules also recommends discipline which is reviewed by support staff solely for consistency. The supervisor, whether lieutenant or captain, consults with his or her shift supervisor on the recommendation, and after collaboration a recommendation agreed to by the lieutenant is forwarded to support staff. Such collaborative efforts nevertheless demonstrate that lieutenants and captains possess supervisory authority. See, generally, *Harbor City Volunteer Ambulance Squad*, 318 NLRB 764 (1995); *Trevilla of Golden Valley*, 330 NLRB 1377 (2000). See, also, *Mountaineer Park, Inc.*, 343 NLRB 1473 (2004).<sup>13</sup>

## **B. Managerial Authority**

The Employer asserts that all its lieutenants and captains are managerial employees in that each is responsible for implementing the Employer's policies and verifying that Hanford Patrol employees comply with those policies. The Employer, in its brief, mentions that PTA captains manage training programs and ensure that personnel are properly certified in their training. The record is more explicit and shows that the PTA must itself be certified by an outside agency and training must be approved by DOE. Ensuring proper training is conducted is not a purely discretionary function of the captains or the Employer and thus not evidence of managerial prerogatives. In any event, scheduling and designing training courses do not demonstrate the exercise of discretion independent of the Employer's established policies or effectuation of the Employer's management policies. See *NLRB v. Yeshiva University*, 444 U.S. 672 (1980).

The record does show that Captains Gibbons, Voigt, McElroy and Wise have managerial prerogatives in that each has authority either to negotiate with and purchase supplies and material from vendors chosen by the captains, and to commit large sums of the Employer's funds for those supplies; or, to represent the Employer with those entities to which the Employer contracts its services. Accordingly, I find Captains Gibbons, Voigt, McElroy and Wise are also managerial employees. See *Trailways, Inc.* 271 NLRB 612, 615 (1984).

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<sup>13</sup> The Employer contends that shift lieutenants and captains demonstrate 2(11) supervisory authority when they send an employee home for sleeping on the job or exhibiting extremely unsafe behavior. However, the Board has found that sending employees home for flagrant misconduct does not evidence supervisory status. See, e.g., *Wilshire at Lakewood*, 343 NLRB 141, n.10 (2004).

The Employer also contends PTA captains demonstrate supervisory authority by training employees. However, the Board has found that training employees does not, without more, evidence 2(11) supervisory authority. See *S.D.I. Operating Partners*, 321 NLRB 111 (1996); *Ohio River*, 308 NLRB 686, 716 (1991).

The Employer further contends its lieutenants and captains evaluate employees. However, §2(11) does not include authority to "evaluate" in its enumeration of supervisory functions. Only when evaluations affect wages and/or job status will the Board find supervisory authority. *Harborside*, supra. Here, raises are automatic and governed by the collective-bargaining agreement. And, as far as evaluating and assessing performance and fitness for duty, any impact on the employee's job status in this area is governed by Employer and governmental requirements outside the authority of the lieutenants and captains. Thus, such evaluations and assessments do not rise to the level of independent judgment necessary to find supervisory authority.

## **VI. CONCLUSION**

Based on the foregoing, the entire record, and having carefully considered the arguments of the parties' briefs, I shall dismiss the petition.

Accordingly, I issue the following Order.

### **ORDER**

**IT IS HEREBY ORDERED** that the petition filed herein be, and it hereby is, dismissed.

### **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14<sup>th</sup> Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on November 20, 2007. The request may **not** be filed by facsimile.<sup>14</sup>

**DATED** at Seattle, Washington this 6th day of November 2007.

/s/ Richard L. Ahearn  
Richard L. Ahearn, Regional Director  
National Labor Relations Board, Region 19  
2948 Jackson Federal Building  
915 Second Avenue  
Seattle, WA 98174

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<sup>14</sup> To file a request for review electronically, go to [www.nlrb.gov](http://www.nlrb.gov) and select the E-Gov tab. Then click on the E-filing link on the menu. When the E-file page opens, go to the heading Board/Office of the Executive Secretary and click the "File Documents" button under that heading. A page then appears describing the E-filing terms. At the bottom of the page, check the box next to the statement indicating that the user has read and accepts the E-File terms and click the "Accept" button. Then complete the filing form with information such as the case name and number, attach the document containing the request for review, and click the "Submit Form" button. Guidance for E-filing is contained in the attachment supplied with the Regional office's original correspondence in this matter and is also located under "E-Gov" on the Board's website, [www.nlrb.gov](http://www.nlrb.gov).